GIMSTERN CORP. (M) SDN. BHD. & ANOR.

v.

GLOBAL INSURANCE CO. SDN. BHD.

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
MOHD. AZMI SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 26 OF 1986]
17 OCTOBER 1986

CIVIL PROCEDURE: *Issues raised in trial not pleaded in statement of defence - Order 18 r. 8 of the Rules of the High Court - Effect.*

CONTRACT: *Construction of agreement - Whether parties can contract out of an Act of Parliament.*

The respondent ran an insurance business and the 1st appellant was appointed by the respondent as an agent in the insurance business under the terms and conditions contained in an agency agreement executed by both parties on 13 November 1979. The respondent had in 1981 sued the 1st appellant in the Sessions Court, claiming a sum of RM18,708.60 being outstanding premium. The 2nd appellant was joined as a co-defendant on the premise that he was the guarantor for the 1st appellant. In the trial at the Sessions Court, certain issues were contended by the appellants although these issues had not been pleaded in the statement of defence. This was in direct contravention of O. 18 r. 8 of the Rules of the High Court.

The Sessions Court upheld the unpleaded contentions of the defence and dismissed the respondent's claim. On appeal this decision was reversed by the High Court. The appellants then appealed to the Supreme Court.

Held:

[1] Taking into account all relevant and available evidence, the appellants' case could not succeed.

[2] Parties cannot contract out of an Act of Parliament and cannot include in their contract terms and conditions which are contrary to the provisions of the Act. If they do so, such terms and conditions are void. See *SEA Housing Corporation Sdn. Bhd. v. Lee Poh Choo* [1982] 2 MLJ 31.

[3] The rule is that if a stipulation in a contract be that the contract shall be void on the happening of an event which one or either of the parties can by his own act or omission bring about, then the party who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract. See per Lord Atkinson in *New Zealand Shipping company Ltd. v. SDAECD France* [1919] AC 1.

[Appeal dismissed with costs.]

Cases referred to:

Attorney-General v. Lord Mayor etc. of City of Sheffield [1912] 106 LT 367
SEA Housing Corporation Sdn. Bhd. v. Lee Poh Choo [1982] CLJ (Rep) 305
New Zealand Shipping Company Ltd. v. SDAECD France [1919] AC 1

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 8
Road Traffic Ordinance 1958, s. 75

For the appellants - Ho Thian Cheh; M/s. Ho Thian Cheh & Co.
For the respondent - C.V. Das (V. Rajindran with him); M/s. Matthew Thomas & Co.

JUDGMENT

Wan Hamzah SCJ:

The respondent in this appeal (to whom we shall refer as the plaintiff company) was running an insurance business and appointed the First appellant (to whom we shall refer as the First defendant) as an agent in the insurance business under the terms and conditions contained in an agency agreement which they executed on 13 November 1979. In January 1981 the plaintiff company brought an action in the Sessions Court against the First defendant claiming a sum of RM18,708.60 being outstanding premium, particulars of which had allegedly been given to the First defendant. The Second appellant (to whom we shall refer as the second defendant) was joined as a co-defendant on the premise that he was the guarantor for the First defendant. Both defendants contest the claim and in their Statement of Defence they contend as follows:

(a) the First defendant had not been supplied with the particulars of the claim;

(b) upon a proper construction of the relevant agreement entered into by the First defendant with the plaintiff company the claim was without basis;

(c) the alleged guarantee by the Second defendant is illegal, inoperative and of no effect.

As regards (b) no facts are pleaded, and thus the contention must be taken to relate to the construction of the agreement not in connection with or in the light of certain facts but to relate to the construction of the agreement by itself purely. Suffice for us to say that the defendants have failed to establish their case on the above issues. Anyhow none of the grounds stated in the memorandum of appeal touches on any of the above issues. Neither did Counsel for the defendants when arguing before us deal with any of the above issues. The above contentions are the only issues raised in the Statement of Defence. However, at the trial before the President of the Sessions Court the defence contended that:

(i) the plaintiff company could claim premium only in respect of the period when it was on risk, and since in some cases premium was not paid by the insured although cover notes had been issued, the plaintiff company was not on risk; and furthermore, some policies had been cancelled by the plaintiff company and in respect of these it was not on risk;

(ii) the First defendant had ceased to operate at 131-A, Jalan Perisai, Taman Sri Tebrau without the consent of the plaintiff company and therefore under Clause 14 of the agency agreement the agency had been thereby terminated.

These issues brought up at the trial had not been pleaded in the Statement of Defence, and this was a contravention of O. 18 r. 8 of the Rules of the High Court, and therefore the contentions should not have been entertained (*Attorney-General v. Lord Mayor etc. of City of Sheffield* [1912] 106 LT 367). However, on the completion of the trial the President of the Sessions Court upheld the unpleaded contentions of the defence and dismissed the plaintiff company's claim. On appeal the High Court reversed the decision of the President and gave judgment for the plaintiff company. Hence this appeal to the Supreme Court by the defendants.

Even if the unpleaded issues had been properly pleaded in the Statement of Defence we do not see how the defendants can succeed. According to the evidence the plaintiff company sent statements of account to the First defendant monthly. The defence did not produce to the Court any letter addressed to the plaintiff company to query the correctness or accuracy of the statements of account. When giving evidence the Branch Manager of the plaintiff company (PW2) explained that in respect of cancelled policies credits were given to the First defendant for the period when the plaintiff company was not on risk, i.e., the period after the cancellation, and he pointed out that credits are shown in the statements of account. On the other hand the defence made no attempt to show that credits were not given or in respect of which particular cancelled policies credits were not given. When giving evidence the Managing Director of the First defendant (DW1) stated that the policies shown in the statement of account P2 from June 1980 onwards had been cancelled. Apart from that statement no evidence was produced to show that those policies had been cancelled. The burden of proving this lies on the defence. It is clear that under s. 75 of the Road Traffic Ordinance 1958 immediately on the issue of every cover note the plaintiff company was on risk in respect of it. This is so notwithstanding the endorsement of the following statement on the insurance proposal form:

> No liability undertaken until the proposal has been accepted and premium paid in full.

The stipulation that no liability is undertaken until premium is paid in full is void as being contrary to the provisions of s. 75. This is the position in cases where cover notes are issued before full premia are collected. Parties cannot contract out of an Act of Parliament, that is to say they cannot include in their contract terms and conditions which are contrary to the provisions of the Act. If they do so such terms and conditions are void: *SEA Housing Corporation Sdn. Bhd. v. Lee Poh Choo* [1982] CLJ (Rep) 305.

The rule is that if a stipulation in a contract be that the contract shall be void on the happening of an event which one or either of the parties can by his own act or omission bring about, then the party who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract, *vide* the judgment of Lord Atkinson in *New Zealand Shipping Company Ltd. v. SDAECD France* [1919] AC 1. In the present case the First defendant alleges that it had not obtained the consent of the plaintiff company to cease to operate at the address stated in Clause 14(ii). Therefore the First defendant being the blameable party cannot be permitted to take advantage of his own wrong in ceasing to operate at that address without the consent of the plaintiff company, to put an end to the agency agreement.

This appeal is dismissed with costs here and in the Courts below. The order of the High Court is affirmed. The deposit should be paid to the respondent (the plaintiff company) on account of taxed costs.

Also found at [1987] 1 CLJ 123